In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-822

ERNEST FRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the Temporary
Emergency Court of Appeals

BRIEF OF AMICUS CURIAE STATE OF OHIO

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INTEREST OF STATE OF OHIO

The State of Ohio is the principal party in the action at bar. Since any decision in this case will directly affect the operation of the State of Ohio, the State respectfully submits this Brief as *amicus curiae* pursuant to Rule 41, Part IV of the Revised Code of the Supreme Court of the United States.

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals is reported at 487 F.2d 936, *United States v. State of Ohio, et al.*

JURISDICTIONAL STATEMENT

The judgment of the Temporary Emergency Court of Appeals was entered on October 5, 1973. The petition for a writ of certiorari was filed on November 23, 1973, and granted on February 19, 1974. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1254(1) and Section 211(g) of the Economic Stabilization Act, as amended.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, clause 3 of the Constitution, in pertinent part, provides:

> The Congress shall have the Power . . . To regulate Commerce . . . among the several States.

Tenth Amendment, United States Constitution:

> The powers not delegated to the United States; nor prohibited by it to the States, are reserved to the States respectively, or to the people.

QUESTION FOR REVIEW

Does the Tenth Amendment bar the federal government from controlling wages and salaries paid to employees of the State of Ohio?

STATEMENT OF FACTS

On January 15, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill 147 (hereinafter referred to as "pay bill") which provided for an average wage and salary adjustment of 10.6 per cent for state, county welfare, and university employees to be paid beginning with the pay period that included January 1, 1972. The State of Ohio filed an application with the Pay Board asking permission to pay these wage and salary increases. On March 6, 1972, the Pay Board decided

that the total wage increase could not be paid because it exceeded the Board's wage and salary standard and instead, allowed payment of an amount eq~~ual to a seven per cent wage~~ increase. The State's request that the Pay Board reconsider its decision and allow for payment of the total increase provided for in the pay bill was denied.

Mandamus actions were filed in the Ohio Court of Appeals, *State of Ohio, ex rel. Ervin v. Gilligan*, and the Supreme Court of Ohio, *Fry v. Ferguson, State ex rel. Boehm v. Legatt, State ex rel. Kaiser v. Ferguson*, requesting that the responsible State officials be ordered to pay the total wage increases provided for in the pay bill. The United States was made a party in the *Ervin* case and participated as amicus curiae in the three Ohio Supreme Court cases.

Both courts ruled that the writs of mandamus should issue and ordered the State to pay the total amount of increases provided for in the pay bill. 34 Ohio st. 2d 252 (1973); 35 Ohio App. 2d 84 (1973). The United States then filed this action in the United States District Court for the Southern District asking that the State of Ohio be enjoined from paying the salary increases in question. Pursuant to a motion filed by the State of Ohio, Petitioner Fry was made a party to the action. The District Court then certified to the Temporary Emergency Court of Appeals the question of " . . . whether the Economic Stabilization Act of 1970 . . . authorizes the Pay Board and other administrative machinery created by said Act and the executive orders and regulations promulgated thereunder, to control the salaries of employees of the State of Ohio in a manner which is in derogation of Senate Bill 147, Section 143.10(A), Ohio Revised Code."

On October 25, 1973, the Temporary Emergency Court of Appeals permanently enjoined the State of Ohio and its officers

from paying the wage and salary increases to the extent that they exceeded the amount authorized by the Pay Board.

Both the State of Ohio and Petitioner Fry filed Petitions for a Writ of Certiorari with this Court. On February 19, 1974, the petition of Ernest Fry was granted.

The Stipulation of Facts submitted to the Temporary Emergency Court of Appeals has been made part of the appendix to petitioner's brief and will be relied upon by the *amicus curiae*.

ARGUMENT

A. Summary of Argument

This Court is being asked to decide whether Congress has the constitutional authority to place limitations on the amount of wages and salaries that states can pay their employees. This issue is of the highest constitutional importance for, under the guise of controlling inflation, Congress has, for the first time in the nation's history, attempted under its commerce powers to exert controls over all state activities. This blatant attack on state sovereignty provides the basis for the underlying issue: namely, whether the preservation of an effective dual system of government – the federal system – which necessarily requires strong independent state governments, is an implied limitation upon the Congressional power to regulate interstate commerce. At issue here is not whether some incidental function or activity of state government may be subjected to federal regulation but whether each and every function of state government can be regulated by Congress resulting in a state's existence being subject to the sufference of Congress.

Although regulation of a few limited state activities have been upheld by the Supreme Court, *Maryland v. Wirtz*, 392 U.S.

185 (1968); *Parden v. Terminal R.R. of Alabama Docks Dep't*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *Case v. Bowles*, 327 U.S. 92 (1946); *California v. United States*, 320 U.S. 577 (1944); *United States v. California*, 297 U.S. 175 (1936); *Board of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48 (1933), none of these decisions can support the concept of control over all state functions. Each case involved regulation of activities which were non-essential to the basic operation of a state and which were activities which the private sector was also involved in. In addition, the Court in *Maryland v. Wirtz* made clear when it required states to pay certain of their employees a minimum wage that it was concerned only with a specific group of employees and not the entire work force of a state, including supervisors, managers, elected officials, and professional people. A large percentage of Ohio's employees fit within this latter grouping.

With no persuasive decision to support Congress' action, this Court must decide whether state sovereignty and the Tenth Amendment require that an implied limitation be placed on the commerce power as it affects the states. These limitations should be those already placed on the taxing power. *E.g., New York v. United States*, 326 U.S. 572 (1946).

Even if Congress has the authority to control in some fashion, all activities of a state, it must show a rational basis for any such regulation. *Maryland v. Wirtz, supra.* No rational basis exists because Congress never evaluated the question of whether the expenditure of state monies for wages and goods had any effect on inflation. In *Maryland v. Wirtz*, the Court was upholding amendments to legislation which had a long history of enforcement and contained specific findings as to the effect low wages had on interstate commerce. The Economic Stabilization Act is unprecedented legislation with no legislative history supporting its application to states.

B. Congress Has Exceeded Its Powers Under the Commerce Clause in Violation of the Tenth Amendment By Attempting to Regulate State Wage and Salary Practices.

The essential issue presented by this case is whether the constitutional principles of federalism implied in the Tenth Amendment require that congressional power under the commerce clause be limited so as to not unduly interfere with the sovereign and indispensable functions of a state government. The Economic Stabilization Act of 1970 constitutes an unprecedented attempt by Congress under the commerce clause to bring under federal control every function performed by state and local governments under the rationale that because the states, in performing such sovereign functions, purchase goods and services and pay wages to their employees, the activities become part of interstate commerce. Congressional regulation of wages paid to all state and local government employees does not, therefore, involve control over certain specific state activities or employees but rather the regulation of state government itself. Such controls and the underlying congressional authority supporting them must be viewed in terms of their effect on state sovereignty and, accordingly, if the Tenth Amendment is to have any meaning in our federal system, the scope of congressional power used to justify such action must be interpreted according to the "uniqueness from the point of view of intergovernmental relations," *New York v. United States,* 325 U.S. 572, 582 (1946), of the activities being regulated and the way in which they are being regulated.

The imposition of federal limitations on a state government's sovereign power to determine its own pay practices creates havoc within the government and among its employees. The formulation and ultimate adoption into law of a state's budget involves the most basic executive, legislative, and political decisions which, because of the Economic Stabilization Act,

can now be overruled or, in a sense, vetoed at the discretion of a federal agency.

A state's ability to compensate its employees with an adequate wage, is essential to the scope, quality, and adequacy of the overall operation of the government. Traditionally, state employees have been under compensated in comparison with their private counterparts thereby causing, to an important extent, the high turnover rates of all employees, both professional and non-professional; an obvious detriment to the ability of the government to function in a manner demanded by its citizenry. And, of course, the cause of the inability to retain personnel is indistinguishable from the reason why the most qualified personnel cannot always be hired in the first place. If the state is now to be forced to exascerbate the situation by limiting the wages of an already underpaid work force, its ability and sovereign right to function as a viable political entity has been severely limited if not effectively destroyed.

Further, wage controls leave the employees themselves with even less say over their destiny than they had before. These employees have always been considered unique members of the nation's work force.[1] Since they provide services rather than produce goods, factors of increased productivity to justify wage increases and other traditional bargaining tools have often not been available to them. Instead, they have had to rely on the judgment of the government and ultimately the people to

1. State employees' political activities have always been limited. *Broderick v. Oklahoma,* 41 U.S.L.W. 5111 (1973), as has been their right to strike. *E.g., Ohio Rev. Code,* Section 4117.01 *et seq.* Traditionally, state employees have been excluded from the coverage of federal employment related legislation. *See, e.g.,* Federal Unemployment Tax Act, 26 U.S.C. Sections 3301, 3306(c) (1964), National Labor Relations Act, 29 U.S.C., Sections 141, 152(2) (1964); State employees are not covered by Social Security legislation. 26 U.S.C., Section 3121(b) (7) (1964); 42 U.S. C., Section 410(a) (7) (1964).

decide how much they can earn.[2] Imposition of wage controls can lessen even more their bargaining position and create the opportunity for commerce to be affected in an adverse rather than beneficial manner.

Congress' use of its commerce powers to bring within its controls the operation of state governments, is a clear abuse of power without any basis in the constitutional history of this country. By exerting wage and salary controls, Congress has said that anytime a state functions as a state, interstate commerce is affected because the performance of each activity necessitates the purchase of goods or the payment of money for wages and salaries. This results in the untenuous conclusion that every employee affects interstate commerce, whether that person be a janitor, law clerk, elected state official, stenographer in the Governor's office, or anyone else hired or paid by the state whose sphere of service is limited to the boundaries of the state.

This does not mean to imply that state activities have ever been totally immune from regulation when they have been activities which were or could be performed by private enterprise. *Maryland v. Wirtz*, 392 U.S. 185 (1968); *Parden v. Terminal R.R. of Alabama Docks Dep't*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *California v. United States*, 320 U.S. 577 (1944); *United States v. California*, 297 U.S. 175 (1936); *Board of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48 (1933); *Sanitary Dist. v. United States*, 266 U.S. 405 (1925). However, none of these decisions justify

2. Am Subst. Senate Bill 147 was adopted only after Ohio's first graduated income tax was passed. The citizens of Ohio had an opportunity later to repeal this tax by a referendum vote but overwhelmingly upheld the tax.

the extraordinary regulations involved in the case at bar.[3] *Maryland v. Wirtz*, 392 U.S. at 204, (Douglas J. dissenting).

In upholding the applicability of the Economic Stabilization Act to the states, the court below relied entirely on the reasoning of *Maryland v. Wirtz, supra,* the only decision involving any form of Congressional interference with a state's fiscal policies. Prior to this case, Congress had never attempted to control any aspect of state wage policy.

The Court, in *Maryland v. Wirtz, supra,* in upholding the Congressional decision to require states to pay certain of their hospital and school employees minimum wage and overtime pursuant to the Fair Labor Standards Act, 29 U.S.C., Sections 20119 (1964), made clear that Congress could not declare that state activities so affected commerce as to allow Congressional control under its commerce powers. In response to the dissenting opinion's concern that the opinion would justify Congressional interference with a state's budgeting activities, the Court majority opinion agreed that just the opposite was intended and stressed that the activities which could be controlled would be those which were or could be performed by private enterprise. 392 U.S. at 196, N.27.

The Court continued by stating: "If a State is engaged in economic activities that are validly regulated by the Federal

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3. Another line of cases, beginning in the mid-1930's, involving issues of state sovereignty are also not appropos to the case at bar. These cases involve federal regulations which were being challenged by a private party and not a state or political subdivision on the basis that the activity being regulated did not constitute commerce or that if it was subject to any regulation at all it should be regulated by the states. The "sovereignty of the states" argument was made not in order to preserve some essential governmental function but only to elude federal regulation of a private economic activity. *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1936); *United States v. Darby*, 312 U.S. 100 (1941); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulations." *Id.* at 197. The Court recognized that it was not dealing with, as here, activities which only states could be involved in but rather with activities which could be performed by both states and private enterprise, such as the state operation of railroads or other businesses. The Court was not confronted with the regulation of state employees who sit as judges, or police the streets and highways as is true under the Economic Stabilization Act. More importantly, it would be a clear misreading of the opinion to argue that it stands for the proposition that any time a state spends money it can be regulated by Congress or that all state activities are part of interstate commerce. The Court's statement that economic activities common to state and private enterprise can be controlled surely was not intended to mean that the economic activity could be the act of putting state collected revenues back into the economy in the form of wages. If that were the case, every activity of a state would come under the purview of Congress.

The Court recognized that some could misread the opinion and attempted to allay this fear by emphasizing that it had "ample power to prevent" any attempt, as here, to control a state's budgeting activities. *Id.* at 196. The time has come for that power to be exerted. The Economic Stabilization Act, if allowed to be applied to the state, brings within federal control all employees of the state even those employed in purely governmental capacities who are paid out of state collected revenues for performing services entirely intrastate in nature. If such employees are to be subjected to the uninhibited control of the Congress and federal agencies, "then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested to by the Tenth Amendment." *Maryland v. Wirtz* at 205 (dissenting opinion).

The case authority preceeding the decision in *Maryland v. Wirtz*, including those decisions relied upon by the majority opinion in that case and the Temporary Emergency Court of Appeals in its opinion, dealt with federal regulatory schemes that in no way affected the sovereignty of the states.

In *United States v. California*, 297 U.S. 175 (1936), and *California v. Taylor*, 353 U.S. 553 (1951), the Court dealt with the regulation of state agencies that were engaged in purely commercial activities; namely, the operation of railroad lines. In *United States v. California*, the Court held that although California, as a state, had the power to operate a railroad, it had, by engaging in commerce, subjected itself to the commerce power. *Id.* at 185. The broad language used by the Court in describing the commerce power of Congress was stated in the context that the activity itself (operation of a railroad) was commerce which the power was, by definition, applicable to in the first place. *California v. Taylor, supra*, applied the same principle that an activity which was commerce could be regulated. Both cases involved a situation where a state was engaged in a purely commercial activity – in competition with private enterprise. It could not be claimed by the states that this activity was integral to the operation of the state or that private industry would not immediately assume the operation of the enterprise if the state stopped doing business. Accord, *Parden v Terminal R.R. of Alabama Docks Dep't*, 377 U.S. 184 (1964); *California v. United States*, 320 U.S. 577 (1944).

In none of these cases could the states have argued that federal regulation would substantially interfere with the essential sovereignty of the state. The Court merely said in each case that if a state wished to operate a commercial and non-essential governmental activity, it would have to conform its practices to federal standards. And, of prime importance, while the state had a "right" to be involved in these as well as many other activ-

ities, none of the activities in question involved the basic operation of the government itself.

The few remaining cases dealing with regulation of certain state activities under the commerce power are also not persuasive. In *Sanitary Dist. v United States*, 266 U.S. 405 (1925), the Court, in sustaining an injunction restraining the Chicago Sanitary District from diverting water from Lake Michigan for the city's use, simply affirmed the federal power of eminent domain exercised pursuant to Congress' power with respect to an obstruction to foreign commerce. There the sanitary district was enjoined from diverting the water in excess of that authorized by the Secretary of War under a specific statute which prohibited alterations and obstructions to the navigable capacity of the Great Lakes. *Accord, City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958). At the most, all that was involved was an interference with a particular state activity under the foreign commerce power; a power which must, by definition, be placed under the exclusive federal authority for purposes of establishing a national policy applicable to the country. See 2 *Story, Commentaries on the Constitution*, Section 1058 (5th ed. 1891). The same proposition is found in *Board of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48 (1933), where the Court, in upholding the inapplicability of the principle of state sovereignty to duties imposed by Congress through its power to regulate foreign commerce, stated: "In international relations and with respect to foreign commerce and trade the people of the United States act through a single government with unified and adequate national Power," 289 U.S. at 59.

Case v. Bowles, 327 U.S. 92 (1946), dealt with Congressional regulation of a non-essential business activity of a state. Here the issue was whether the state's sale of timber performed in accordance with state law but done in violation of a federal ceiling price could be enjoined. In sustaining the federal act as

an exercise of the war power, the court stated:

> . . . Our only question is whether the states power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry out war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sale . . . charged by a state . . . (T)he result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment.
>
> To construe the Constitution as preventing this could be to read it as a self defeating charger . . . *Id.* at 102.

Here, as in the previously cited cases, the state's power to sell timber, while within the scope of its sovereignty, did not go its ability to function.

These decisions all contain broad language concerning the federal powers over commerce which must be read in the context of each particular fact situation. The Court was never presented with the problem of decising the limits of federal power over the states. Each must be examined in light of the degree of federal intrusion involved in each case. If, on the other hand, broad dictum supporting a relatively slight and non-basic intrusion can be transposed out of context and used to authorize a much more serious and devastating form of regulation, then no limitation can be placed on federal power and state sovereignty is dead.

Such an interpretation of the commerce clause would be beyond the understanding of the ratifiers of the Constitution who understood the purposes of the new power to be to halt the erection of trade barriers by the states against each other

and not to permit regulation of the states' own government. See *Madison, The Federalist, No. 42; Frankfurter, The Commerce Clause under Marshall, Taney and Waite* (Univ. N. Car. Press, (1937), 12-13. It was understood by the states that the powers would be used to protect them from destroying each other commercially and not as a weapon *against* the states. In adopting the Constitution the states did so with the understanding that they were to be an integral part of the new federal system without fear of federal encroachment on their authority through use of the new power. As stated by Hamilton, the advocate of strong national government: "It may safely be received as an axiom in our political system, that the State Government will, in all possible contingencies, afford complete security against invasions of the public liberty by the National Authority." *Hamilton, The Federalist No. 28.*

With special relevance to the case at bar is Madison's description in *The Federalist No. 45* of the powers of the two sovereignties:

> The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. Powers reserved to the several States will extend to all the objects, which come under the ordinary course of affairs, concerning the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State.

Although there was little opposition to the delegation of the commerce power, the states were still concerned over the degree of control over state government which the national government might have been authorized to exercise under the

new Constitution. Several states ratified the Constitution only upon the condition that certain amendments be added including one which would reaffirm the understanding that the powers not delegated to the national government were reserved to the states, free from national interference. At the first Congress assembled under the Constitution, Madison's committee proposed a series of amendments, the last being the Tenth Amendment.

It is agreed that the Tenth Amendment added nothing specifically to the Constitution; it neither enlarged nor restricted any particular state or national power. *United States v. Spragg*, 282 U.S. 716 (1931). But, it did confirm the understanding that the federal government was one of specific powers, and that all power was reserved to the states or the people. It is clear that the states never intended to create a national government which could, under any of its powers, interfere with the operation of state government. As stated by the Court in *Texas v. White*, 7 Wall. 700 (1868):

> The preservation of the states and the maintenance of their governments are as much with the design and care of the Constitution as to the preservation of the Union and the maintenance of the national government. The Constitution, in all its provinces, looks to an indistructible union, composed of indistructible states. *Id.* at 725.

In the past, the issue of total control over state wages was once considered (but not attempted) by the federal government during World War II. In 1942, the National War Labor Board did consider whether it had the power to oversee the maximum compensation of state and local government employees. In deciding that it and the Federal government generally had no jurisdiction in the matter, the Board stated:

> It has never been suggested that the federal government has the power to regulate with respect to wages,

> working hours, or conditions of employment of those who are engaged in performing services for the states or their political subdivisions. Any action by the National War Labor Board in attempting to regulate such matters by directive order would be beyond its power and jurisdiction. The employees involved in the instant cases are performing services for political subdivisions of state governments. Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employees would constitute a clear invasion of the sovereign rights of the political subdivisions of local state government. Case No. 47, Case No. 726, National War Labor Board, December 23, 1942, reported in *Rhyme, Labor Unions and Municipal Employee Law*, 226 *et seq.* (1946).

It should be noted that this matter was decided after the decisions in *United States v. Darby*, 312 U.S. 100 (1941) and *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1936).

Guidance in determining whether the regulation of state wage practices can be upheld is also to be found in the Court's interpretation of the limits to be placed on Congressional taxing powers. Although limitations on the commerce power have not been delineated by the Court as they have in the taxing area (primarily because until this case, Congress has never attempted to regulate all state activities), there appears to be no justification for not applying the reasoning in the tax cases to the case at bar.

In *New York v. United States*, 326 U.S. 572 (1946), the definitive analysis of the implied limitation on the Congressional power to tax (and destroy), all eight Justices taking part in the case agreed that some degree of state immunity existed, that is that there was implied in the Constitution a limit to the federal taxing authority. In upholding a federal tax on mineral waters

sold by the State of New York, the "majority" opinion of Justices Frankfurter and Rutledge recognized that although the power of Congress to tax reaches every subject, the "fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing powers *as in other aspects of government.*" *Id.* at 575 (emphasis added.) They admitted that there were "of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations," *Id.* at 582, which, therefore, could not be taxed.

Chief Justice Stone, in his concurring opinion, stated that the limitation had to exist whenever a federal tax, even though not discriminatory as to the subject matter, so affected the state "merely because it is a state that is being taxed as to interfere unduly with the state's performance of its sovereign function of government." *Id.* at 587. Chief Justice Stone[4] concurred because he felt the majority opinion simply stated in a new form of words,

> . . . that a tax which Congress applies generally to the property and activities of private citizens may not be in some instances constitutionally extended to the states, merely because the states are included among those who pay taxes on a like subject of taxation . . . This is not because the tax can be regarded as discriminatory but because the sovereign government is the taxpayer, and the

[4]: Chief Justice Stone wrote the majority opinions in *United States v. Darby, supra,* and *United States v. California, supra,* which contain much of the broad language relied upon by the Court in *Maryland v. Wirtz.* Because of his stated concern for state sovereignty, it would be illogical to assume that he intended that the states could be destroyed via the commerce powers but not the taxing powers or that the concepts of federalism impliedly limited only the congressional power to tax. If the Chief Justices's position is to be given any consistency, the commerce power decisions must be read in conjunction with his opinion in *New York v. United States.*

> tax even though non-discriminatory, may be regarded as infringing its sovereignty. *Ibid.*

Further on in the opinion he stated, "Only when and because the subject of taxation is state property or a state activity must we consider whether such a non-discriminatory tax unduly interferes with the performance of the state's function of government. *If it does, then the fact that the tax is non-discriminatory does not save it.*" *Id.* at 588.

Justices Black and Douglas agreed with the distinction raised by the other Justices but dissented from the result of the case. They quoted with approval the doctrine of *United States v. Baltimore and Ohio R.R. Co.*, 17 Wall. 322 (1873).

> The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively their operation may be impeded and may be destroyed, if any interference is permitted. *Id.* at 593.

Recognizing that each time Congress is allowed to interfere with sovereign state functions it has advanced one step further towards the destruction of the states as effective political entities and that, therefore, the need for the preservation of the federal-state form of government required that limitations had to be placed on this congressional power to destroy, the Court found such limitations on the taxing power to be implied in the Constitution. The same limitations have not been explicitly placed on the commerce power presumably because, up to this time, it had been assumed that the effect on the states (and the federal sys-

tem) of the commerce power could not be as great as that of the power to tax. This is implicit in the reasoning of *United States v. California*, 297 U.S. at 184. That assumption can no longer be relied upon.

For the first time, Congress has tried, under the Economic Stabilization Act, to exert its powers under the commerce clause over all state activities. If this Act, and the reasoning supporting it (that the state's payment of money for goods, services or wages brings a state under congressional control) is upheld, there is no logical way to stop Congress from legislatively abolishing the states as effective instruments of government. Once all activities are held to have affected interstate commerce, and that must be the ruling of this Court if the Act is ruled to be constitutional as it applies to the states, all barriers to state sovereignty have been abolished. The results are best summarized by Justices Douglas and Black who stated: "The notion that the sovereign positions of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." *New York v. United States*, 326 U.S. at 594 (dissenting opinion).

C. Congress Had No Rational Basis for Attempting to Regulate the Wage and Salary Practices of the States.

Assuming, arguendo, that under certain circumstances, Congress can regulate, in some way, all of the activities of a state (or at least all of the activities which require the expenditure of money for goods or wages), the specific controls can be sustained only if Congress had a rational basis for determining that the activity being regulated had a substantial effect on interstate commerce. Therefore, before states can be bound by the wage and salary control provisions of the Economic Stabilization Act, it must be decided that Congress could have rationally determined that the wages and salaries paid to all

state employees had such an impact on inflation as to substantially effect interstate commerce. In doing so, the Court must proceed past the point of deciding whether wages and salaries of all employees affect inflation and deal with the more difficult question of whether Congress ever considered the impact state employees' wages could have on the economy. *Maryland v. Wirtz*, 392 U.S. at 196, n.27.

In making this analysis, there is no prior legislation, findings by Congress or past judicial decisions to rely upon. The justification for upholding the application of certain provisions of the Fair Labor Standards Act to states in *Maryland v. Wirtz, supra,* is not persuasive because that Act, unlike the Economic Stabilization Act, had a long history of prior enforcement and, more importantly, the regulations in question were clearly supported by specific Congressional findings.[5] With this as a basis, the Court in *Wirtz* could find a rational basis for Congress' action by examining the similarities between all low paid workers employed in activities which affected interstate commerce and concluding that, as a general proposition, the payment of wages below a certain minimum could lead to labor strife and potential disruptions of interstate commerce. 392 U.S. at 194-195.

The Economic Stabilization Act has a much different history. No evidence exists that Congress, when it adopted the original act, even intended that it be applied to the states. Both

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[5] Section 2 of the Act, 52 Stat 1060, 29 USC Section 202, reads in part as follows:

"The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce . . ." See *Maryland v. Wirtz*, 392 U.S. at 188-191.

the original and the amended act make no mention of the states in relation to wage and salary controls. It is only when an examination is made of congressional proceedings prior to the adoption of *amendments* to the act, that any reference is made to the states.

Out of all the debates, committee hearings, and reports which preceeded the adoption of amendments to the act, the only rationale found for the imposition of controls are Senator Tower's belief that it would be unfair to control the wages of private employees without doing the same to public workers, 117 *Cong. Rec.* 43,674 (1971), Secretary Connally's statement during committee hearings that the size of the state and local government work force justified the use of controls,[6] *Hearings on H.R. 11309 Before House Comm. on Banking & Currency*, 92 Cong., 1st Sess. 342 (1971); the remarks of Congressman Williams at a committee hearing that ~~an increase~~ in wages *could* result in an increase in taxes which *could* result in an increase in the taxpayer's cost of doing business thereby causing prices to rise, *Id.* at 208, 232; and the statement in the Senate's report that states were not exempted from controls because of the possibility that the exemption could cause certain unexplained enforcement problems and could result in abuses. *S. Rep.* No. 92-507, 92d Cong., 1st Sess. (1971).

None of these positions can support a determination that Congress had a rational basis for controlling state wage practices. Senator Tower's argument would obliterate any distinction between state government and the private sector of the economy; a step that has never been proposed by Congress much less given credance by this Court. Secretary Connally's position would accomplish the same result as well as justify controls over a state

6. Ordinarily, remarks of witnesses made at committee hearings as to the nature and effect of a bill are given little weight by the courts. 2A *Sutherland, Statutory Construction*, Section 48.18 (4th ed. 1973).

whenever the state expanded or improved its activities by hiring additional personnel or entered into new areas of public concern. The question of enforcement problems as a justification for inclusion within a regulation was unsuccessfully argued once before in the context of price controls over public utilities. *Davis Warehouse Co. v. Bowles,* 321 U.S. 144, 155 (1944). Certainly difficulties with enforcing regulation of the private sector could provide no basis for justifying this attempt at seriously undermining state sovereignty.

The "tax" argument is not only illogical in view of the terms of the Act that Congress adopted but, more importantly, supports a method of controlling the taxing powers of a state through indirect means. Since the Act places no controls over a state's power to tax and, as recognized by the Cost of Living Council, imposes few controls over a state's power to spend, Section 101.31 *et seq.*, C.O.L.C. Regs., a state can, in essence, charge what it wants for its services. Control over wages will have, therefore, no effect on the amount of money put into the economy by the state since it can collect all the taxes its citizens agree to have imposed on them and spend whatever it wants for everything other than wages. The limitation on wage increases simply means that the money will be put back into the economy in other forms of expenditures. And if controlling wages would have a noticeable effect on the amount of taxes imposed by a state, which it does not, ~~the control of wages for that reason~~ would be no different than if Congress decided to limit the amount of taxes that could be collected by a state; an action clearly in violation of the Constitution.

In essence, the legislative history provides no substantive or rational support for the regulation of state pay practices. In addition, while it is agreed that wages and salaries are major components of the cost of producing goods and services and must generally be offset by either an increase in productivity or

prices, this has no relation to the activities engaged in by a state. Congress recognized this obvious fact when it established, under the Economic Stabilization Act, a National Productivity Policy. P.L. 92-210. This policy was developed in order to "promote efficient production, marketing, distribution, and use of goods and services in the private sector" in order to "achieve the objectives of national economic policy." *Id.* at Section 4(a) (1). If the productivity of state employees was crucial or necessary in the fight against inflation, one must wonder why this "National Policy" was directed solely towards the private sector and the need to "foster and promote increased productivity through *free competitive enterprise.*" *Id.* at Section 4(a) (4) (emphasis added). The reason is obvious; either Congress recognized the clear distinction, both in fact and law, between the operation of a sovereign state government and the production of goods and services for private profit or Congress never considered including the states within the policy. Either way, the productivity argument provides no basis for justifying the imposition of state wage controls.

The only supportable conclusion to be drawn is that Congress, in reality, never examined the alleged impact that state wage and salaries could have on inflation. It is clear therefore that no evidence exists to conclude that Congress had any basis for exerting its commerce powers over the states.[1] The only way this Court could find that Congress had a rational basis for its decision to control wages would be if Congress had rationally decided the issue. Congress never made such an examination. This Court should not assume what Congress never determined.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Economic Stabilization Act of 1970, as amended, to the extent that coverage thereunder is extended to the wage and

salary practices of state governments, is in contravention of the United States Constitution. This Court should, therefore, vacate the order of the Temporary Emergency Court of Appeals and remand the case back to the United States District Court for the Southern District of Ohio with instructions that the federal government's request for a permanent injunction be denied.

Respectfully submitted,

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